capacity of approximately channels, 17 on the basic tier, 22 on expanded basic, and 6 premium channels. According to TCI-South's rate card, subscribers to the expanded basic tier pay $13.27 per month for that tier.

On February 10, 1994, Ms. Maria Silveira, TELEMIAMI's General Manager, attended a meeting called by Tele-Communications, Inc. ("TCI") for companies who either have or desire commercial leased access agreements with TCI affiliates. The meeting was run by Mr. Tony Bello, TCI's State Director of Business Development, with the assistance of Bettye Greer, Director of Administration and Development for TCI, and a man who was introduced as TCI's Sales Director. TCI personnel distributed schedules of leased access rates for TCI's various systems in the Miami area, along with a copy of a form contract.

Mr. Bello stated that TCI was "forced by the FCC" to charge the new rates, and that the amounts were mandated by the FCC. Ms. Silveira and the others were told that they had thirty days to sign the form contract that had been distributed.

Under TCI's new rate schedules, UBC's monthly lease payments for access to the Miami-TCI and TCI-South systems would total $47,758, an increase of <u>562%</u> over its current combined payments of $8,500. For the TCI-South system alone, the new rate is $26,341 per month, an astounding increase of 753% over the current monthly rate of $3,500.

On February 11, 1994, Mr. Bello and Ms. Silveira met again. Ms. Silveira stated that TCI's proposed new leased access rates were too high. After figuring in administrative costs, the cost of programming, and low advertising rates due to a lack of a ratings system for cable programming and competition from operators (including TCI), which offer spot advertising at rates as low as $49.00 for thirty seconds, Ms. Silveira explained that neither UBC nor any other commercial leased access programmer could possibly afford to stay in business at TCI's new proposed leased access rates.

Ms. Silveira offered to negotiate a lower price, but Mr. Bello replied that the price had been calculated according to the FCC's formula. Ms. Silveira responded that the Commission's rules only set a maximum rate, and nothing in the FCC's Report and Order said that it was the only permissible rate. Ms. Silveira then asked for documents and calculations substantiating TCI's proposed new rates. This information has never been provided.

On March 7, 1994, Ms. Silveira was told by Mr. Bello that TCI would not negotiate with UBC, and that there would be no written communications from TCI. On March 11, Ms. Silveira sent Mr. Bello a letter summarizing her understanding of TCI's position and asking him to correct any misconceptions. She stated her understanding of TCI's position as follows: (1) the new maximum rates were the only rates acceptable to TCI; (2) none of the terms of TCI's proposed new form contract were negotiable; and (3) TCI refused to deal with UBC on any point unless UBC first signed the form contract "as is." To date, UBC has received no response from TCI to her March 11 letter.

On April 7, 1994, however, Ms. Silveira received a letter from Mr. Bello stating that because of UBC's failure to execute a contract with TCI (presumably the form contract mentioned above), TCI-South will no longer carry TELEMIAMI, effective on or about June 1, 1994.

Thus, TCI's refusal to negotiate will force UBC off the air. Even if UBC agreed to pay TCI-South's new monthly rate of $26,341, UBC would be forced out of business within three to four months. Indeed, UBC's monthly payments to TCI-South under its new rates would be 60% higher than UBC's entire monthly revenues. If the other systems that are now carrying UBC's programming do the same, UBC will have to shut down even sooner.

III. Discussion

The 1992 Cable Act substantially amended the commercial leased access provision of the Cable Communications Policy Act of 1984, 47 U.S.C. § 532. In enacting the 1992 Cable Act, Congress made clear its goal of promoting the competition provided by diverse commercial leased access programmers such as UBC. It amended 47 U.S.C. § 532(a) to state explicitly that "[t]he purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems . . . ." (emphasis added).

Congress was also concerned that operators might have incentives to establish unreasonable terms or refuse to lease channel capacity. Specifically, the legislative history makes clear that the amendments to Section 612 were designed to "act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access [or] given access on unfavorable terms." S. Rep. No. 102-92, 102d Cong., 2d Sess. at 30, reprinted in 1992 U.S.S.C.A.N. 1133, 1163. Consequently, the 1992 Act directed the FCC to determine the "maximum reasonable rates" that an operator could establish, and to establish reasonable terms and conditions for such use. 47 U.S.C. § 532(c)(4).

In adopting the required regulations, the FCC noted its view that commercial leasing "could serve important diversity and competition objectives . . . ." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, Docket 92-266, 8 FCC Rcd. 5631, 5936 (1993) (Report and Order). The Commission also received comments to the effect that excessive rates were a significant reason for the lack of development of commercial leased access programming. Report and Order at ¶ 510. Finally, the Commission expressed its expectation that its rate formula would lead to lower rates:

> We expect that setting maximum rates on this basis will eliminate uncertainty in negotiations for leased commercial access. It will also automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classification as those paying the highest implicit fee,

> and, in some cases the maximum rate per subscriber will be no more than a small portion of the basic service tier fee. Thus, we are making our decision in this matter based on an expectation that, under these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access.

Id. at ¶ 521 (emphasis added).

With that background, it is simply inconceivable that the Commission intended for its rules to sanction the 800% skyrocketing of leased access rates that TCI-South has demanded, or that the Commission ever anticipated that its new rules would force a previously viable leased access programmer like UBC out of business.

UBC believes that the Commission's rules are not comprehensive enough, and do not contemplate situations in which leased access providers do not receive payment directly from subscribers. Indeed, UBC's operations are not substantially different from those of a traditional cable programming network. UBC assembles programming from various sources and then distributes it over the four systems that carry TELEMIAMI. For that reason, the new rates are not reasonable when applied to UBC's situation. UBC believes that TCI-South should actually pay UBC for the right to carry UBC's programming because the highest implicit fee in this case is the lowest per subscriber fee that TCI-South pays a non-affiliated programmer on the expanded basic tier.

As the Commission explicitly recognized, its leased access rules, including its implicit fee formula, are not to be woodenly applied, but are instead merely a starting point to be developed on a case-by-case basis:

> The rules we adopt should be understood as a starting point that will need refinement both through the rule making process and as we address issues on a case-by-case basis. In this regard we are aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved -- whether the lease is for a pay channel, an advertiser supported channel intended for wide distribution, a channel for a narrow commercial purpose not relevant to the wide body of cable subscribers, or for a single program or series of programs. Thus, we are not at this time attempting to comprehensively resolve all the issues potentially involved, many of which can better be resolved in a more specific concrete factual setting.

<u>Report and Order</u> at ¶ 491. The Commission went on to note that the implicit fee approach in the rules is only "an initial guide until we gain more experience in this area." <u>Report and Order</u> at ¶ 515.

UBC's situation proves the wisdom of the Commission's stated preference for flexibility in interpreting and applying the new leased access rules. As noted, the Commission's implicit fee formula simply does not address a situation like UBC's at all: a leased access provider carried as part of a cable operator's expanded basic tier that derives all of its revenue from advertising and charges no fee at all to subscribers to view its programming. Instead, the implicit fee formula is premised entirely on the assumption that a leased access channel represents foregone revenue to the operator. Indeed, the formula purports to derive the per-subscriber margin <u>in subscriber revenue</u> the operator would have earned had it been able to use the channel as another basic, expanded basic or premium channel on its system.

In the case of UBC, however, this approach overlooks the fact that TCI-South is already earning <u>subscriber revenue</u> from the channel UBC leases. Because UBC is carried on TCI-South's expanded basic tier, TCI-South is not foregoing any subscriber revenue <u>at all</u> by carrying UBC. Rather, TCI-South is charging subscribers $13.27 per month for the expanded basic tier on which TELEMIAMI is carried.[1] In addition, TCI has been charging UBC $3,500 per month for the channel. Assuming that there are approximately 50,000 subscribers on the TCI-South system, this means that TCI has already been earning <u>two</u> streams of revenue for the channel it leases to UBC: (1) 7 cents per month per subscriber from UBC's lease payment;[2] <u>plus</u> (2) 60 cents per month from each subscriber that receives TELEMIAMI as part of TCI-South's expanded basic tier.[3]

Thus, where, as here, a leased access programmer is carried on a tier for which the cable operator is already receiving subscriber revenues, literal application of the implicit fee

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[1] Moreover, under the FCC's per-channel benchmark rate formula, TCI-South is able to charge a higher rate for the expanded basic tier by including TELEMIAMI on that tier.

[2] 50,000 subscribers divided by $3,500 per month = $0.07 per month per subscriber.

[3] Because TELEMIAMI is one of 22 channels on TCI-South's expanded basic tier, and TCI-South charges subscribers $13.27 per month for that tier, TCI-South receives $13.27 divided by 22 = 60 cents per month from subscribers attributable to carriage of TELEMIAMI. <u>See</u> <u>Report and Order</u> at note 1312.

formula would have the perverse effect of allowing a cable operator to double-recover the revenues the operator receives from subscribers: once when the subscriber pays the operator the monthly charge for the tier on which the leased access programmer is located, and again when the leased access provider pays the implicit fee, which is supposed to represent supposedly foregone subscriber revenue which, of course, the operator is not in fact foregoing at all.

In fact, for leased access programmers like UBC that are carried on an operator's basic or expanded basic tier, the "highest implicit fee charged any nonaffiliated programmer within the same category" (Report and Order at ¶ 519) is actually the lowest per subscriber fee that the cable operator pays a non-affiliated programmer on that tier. Thus, the true maximum rate here should be the lowest per subscriber fee that TCI-South pays a non-affiliated programmer on the expanded basic tier that includes TELEMIAMI. Any other method transforms leased access into a windfall for cable operators, permitting them to double-recover their subscriber revenue margins from subscribers and from leased access programmers.

TCI-South can hardly complain that this would cost too much. For one thing, TCI's programming costs are not excessive. We estimate that TCI-South pays approximately $3.34 per subscriber per month for programming, not including any applicable volume discounts. Since expanded basic subscribers pay $24.12 per month, programming constitutes less than 13.7% of TCI-South's costs. Furthermore, assuming that VH-1, the lowest-priced channel TCI-South carries, is not affiliated with TCI, the highest implicit fee for the TCI-South system would be approximately $3,000 per month.[4] This is hardly an excessive or burdensome amount for TCI-South to pay for TELEMIAMI's programming.

The Commission should also reexamine the possibility of limiting commercial leased access rates by the prevailing market rate in a franchise area. Such information may not be available in many cases, but in at least some metropolitan areas it is, as established by UBC's past and current contracts. Although UBC's original lease with TCI-South has expired, it has been extended in writing on a month-to-month basis. Consequently, UBC has an agreement in place for the TCI-South system just as it does for Miami-TCI. Those agreements, together with the Gold Coast Lease and the Adelphia Lease, establish a market rate for leased channel access in Dade County.

The Commission has stated that its rules are only a starting point that will need refinement. Report and Order at ¶ 491. The Commission resorted to the implicit fee calculation at least in part because it did not have sufficient information regarding market rates for leased access. Report and Order at ¶ 514. In cases such as this one, however, there is sufficient information to set a maximum rate based on the market rate.

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[4] 50,000 subscribers multiplied by $0.06 per month = $3,000 per month.

The UBC leases discussed above are reliable indicators of market rates, making the calculation of an implicit fee unnecessary. In such cases, the Commission could tie TCI's rates for the renewal of existing channel access leases to agreements in effect for the preceding calendar year, just as it has in calculating the highest implicit fee. UBC's experience shows that the market rate in Dade County is no more than about $3500 - $5000 a month. Not only is that what UBC is paying TCI, but UBC was close to an agreement with Gold Coast at a similar price, until Gold Coast, like TCI, decided to use the FCC's new rules as an excuse for more than a five-fold boost in rates.

Accordingly, UBC believes that the Commission should bar cable operators from charging leased access rates in excess of the prevailing market rate for commercial leased channels in those franchise areas for which information regarding market rates is available.

IV. Conclusion

In any event, the Commission must act soon and reexamine its current rules if leased access programmers are to survive.

Respectfully submitted,

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